Lee Ah Lan v Lee Kim Lan Construction Industries Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–107 OF 1996
LOW HOP BING J
21 APRIL 2003

Civil Procedure *— Third party proceedings — Notice — Whether second defendant entitled to issue notice to first defendant claiming for a relief or remedy relating to or connected with the original subject matter of the action — Purpose of Rules of the High Court 1980 O 16 r 8(1)(b)*

The plaintiff's claim against the first defendant was premised on the fact that there had been an agreement between the plaintiff and the first defendant ('the sale and purchase agreement') whereby the first defendant, as co-owner of an undivided share of the land ('the land') had agreed to sell and the plaintiff had agreed to purchase four lots on the land ('the sub lots'). The plaintiff alleged that the first defendant was supposed to subdivide the land into 38 lots. The plaintiff further alleged that the plaintiff had remitted the payment for the sub lots to the first defendant but there has been no application by the first defendant for the subdivision of the land and the first defendant had continued to enjoy the use of the sub lots for its own benefit and purposes. The plaintiff also alleged that the first defendant had prevented the plaintiff from enjoying the use of the sub lots. Subsequent to the plaintiff's claim, the first defendant had applied to have the second defendant included as a defendant to this suit on the ground that the second defendant is a co-owner of the undivided share of the land. The second defendant made an application to amend her defence and counterclaim to reflect the true and accurate position in this suit. The first defendant objected to this application. Pursuant to O 16 r 8(1)(b) of the Rules of the High Court 1980 ('the RHC'), the second defendant's sought to obtain leave of the court to issue a notice to the first defendant claiming for a relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff.

Held:

(1) The manifest purpose of O 16 r 8(1) of the RHC was to avoid multiplicity of proceedings as the second defendant's claim against the first defendant is for a relief or remedy relating to or connected with the original subject matter and that coincides with the plaintiff's claim for relief or remedy against the second defendant and both these claims are substantially the same (see p 521C–D).

(2) Upon a proper perusal of the entire provisions of O 16 r 8(1) of the RHC, in particular para (b), there can be no doubt that the second defendant was at liberty to issue and serve on the first

defendant the notice as specifically particularized, without leave of the court because the first defendant is already a party to the suit herein. While leave of the court is required to issue such a notice to a person who is not already a party to the action, such a rule does not apply to a person who is already a party; *Tawse v Loveridge* [1883] 25 Ch D 76 followed. In the instant case, since the second defendant is not bringing a counterclaim against the first defendant, under O 16 r 8(1)(b), the second defendant is entitled to issue and serve the said notice, without leave, on the first defendant (see p 520D–F, H).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan pertama adalah berdasarkan hakikat bahawa terdapat satu perjanjian antara plaintif dan defendan pertama ('perjanjian jual beli tersebut') di mana defendan pertama, sebagai pemilik bersama satu bahagian yang belum dibahagikan ke atas tanah ('tanah tersebut') telah bersetuju untuk menjual dan plaintif telah bersetuju untuk membeli empat lot atas tanah tersebut ('sublot-sublot tersebut'). Plaintif mengatakan bahawa defendan pertama sepatutnya membahagaikan tanah tersebut kepada 38 lot. Plaintif seterusnya mengatakan bahawa plaintif telah meremitkan bayaran untuk sublot-sublot tersebut kepada defendan pertama tetapi tiada apa-apa permohonan oleh defendan pertama untuk pembahagian tanah tersebut dan defendan pertama telah terus menikmati kegunaan sublot-sublot tersebut untuk kepentingan dan tujuan sendiri. Plaintif juga telah mengatakan bahawa defendan pertama telah menghalang plaintif daripada menikmati kegunaan sublot-sublot tersebut. Berikutan tuntutan plaintif, defendan pertama telah memohon agar defendan kedua dimasukkan sebagai seorang defendan kepada guaman ini atas alasan bahawa defendan kedua adalah pemilik bersama bahagian yang belum dibahagikan tanah tersebut. Defendan kedua telah membuat satu permohonan untuk meminda pembelaan dan tuntutan balas beliau untuk menggambarkan kedudukan sebenar guaman ini. Defendan pertama telah membangkang permohonan ini. Menurut A 16 k 8(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), defendan kedua telah memohon untuk mendapatkan kebenaran mahkamah untuk mengeluarkan satu notis kepada defendan pertama yang menuntut satu relief atau remedi berkaitan dengan perkara pokok yang asal tindakan dan berikutan itu yang sama seperti relief atau remedi yang dituntut oleh plaintif.

Diputuskan:

(1) Tujuan utama A 16 k 8(1) KMT adalah untuk mengelak daripada penggandaan prosiding kerana tuntutan defendan kedua terhadap defendan pertama adalah untuk suatu relief atau remedi berhubung atau berkaitan dengan perkara pokok yang asal dan

yang sama seperti tuntutan plaintif untuk relief atau remedi terhadap defendan kedua dan kedua-dua tuntutan tersebut adalah memang sama (lihat ms 521C–D).

(2) Setelah meneliti keseluruhan peruntukan A 16 k 8(1) KMT, khususnya perenggan (b), tidak boleh diragui bahawa defendan kedua bebas untuk mengeluar dan menyampaikan ke atas defendan pertama notis tersebut sepertimana yang khususnya telah diperincikan, tanpa kebenaran mahkamah kerana defendan pertama telahpun menjadi satu pihak kepada guaman di sini. Tatkala kebenaran mahkamah diperlukan untuk mengeluarkan suatu notis sedemikian kepada seseorang yang bukan satu pihak kepada tindakan, peraturan sebegini tidak terpakai ke atas seseorang yang memang telah menjadi satu pihak; *Tawse v Loveridge* [1883] 25 Ch D 76 diikut. Dalam kes semasa, memandangkan defendan kedua tidak akan memulakan satu tuntutan balas terhadap defendan pertama, di bawah A 16 k 8(1)(b), defendan kedua berhak untuk mengeluar dan menyampaikan notis tersebut, tanpa kebenaran, ke atas defendan pertama (lihat ms 520D–F, H).]

Notes

For cases on notice for third party proceedings, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 6292.

Cases referred to

Burford, Re, Burford v Clifford [1932] 2 Ch D 122 (refd)
Ewe Koek Neoh v Ooi Soon Tin & Ors [1926] 2 MC 107 (refd)
GP De Silva & Ors v Chua Yam Thong [1962] MLJ 236
Myers v N & J Sherick Ltd & Ors [1974] 1 All ER 81 (refd)
Standard Securities, Ltd v Hubbard & Anor [1967] 2 All ER 622 (refd)
Tan See Yin Vincent v Noone & Co & Anor [1995] 1 MLJ 705 (refd)
Tawse v Loveridge [1883] 25 Ch D 76 (folld)

Legislation referred to

Land Code Cap 138 s 44(1)
National Land Code, especially ss 342, 343(1)(b)
Rules of the High Court 1980 O 16 r 8(1)(b), (3)

S Letchumanan (*Letchu Suppiah & Co*) for the first defendant.
Liza Chan (*Liza Chan & Co*) for second defendant.

Low Hop Bing J:

APPLICATION

Pursuant to O 16 r 8(1)(b) of the Rules of the High Court 1980, the second defendant's application in encl 108 seeks to obtain leave of the court to issue

A a notice to the first defendant claiming for a relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff.

BACKGROUND

B For purposes of completeness, it is necessary to state the background leading to this application.

In the instant suit, the plaintiff's claim against the first defendant is premised on the fact that there had been an agreement between the plaintiff and the first defendant on 15 February 1983 ('the sale and purchase C agreement') where by the first defendant, as co-owner of 169/180 undivided share of the land held under CT No 10075 Lot No 31, Section 11, Bandar Kajang, Daerah Ulu Langat ('the land') had agreed to sell and the plaintiff had agreed to purchase four lots temporarily marked as sub lots 2, 3, 13 and 14 on the land ('the sub lots').

The plaintiff alleged that the first defendant was supposed to subdivide D the land into 38 lots. The plaintiff further alleged that the plaintiff had remitted the payment for the sub lots to the first defendant but there has been no application by the first defendant for the subdivision of the land and the first defendant had continued to enjoy the use of sub lots 13 and 14 for its own benefit and purposes. The plaintiff also alleged that the first E defendant had prevented the plaintiff from enjoying the use of sub lots 2 and 3. As a result of this, the plaintiff claimed against the first defendant, inter alia, as follows:

(a) a declaration that the plaintiff is a beneficial owner of the sub lots pursuant to the sale and purchase agreement;

F (b) an order that within 14 days the first defendant or the second defendant take steps to apply to the State Authority in writing for the change of conditions or use of the land and subdivision of the land for individual titles to be issued to enable the plaintiff to be registered as owner of the sub lots;

(c) an order that should the first or second defendant fail to take any steps G within 14 days to apply to the State Authority in writing for the change of conditions or use of the land and subdivision of the land for individual titles to be issued to enable the plaintiff to be registered as owner of the sub lots, the plaintiff is to be granted leave to make a direct application to the State Authority for the change of conditions H or use of the land and subdivision of the land for individual titles to be issued and the first and second defendants, upon the request of the plaintiff, will immediately forward all documents which would be necessary for the plaintiff to make the direct application;

(d) a mandatory injunction against the first defendant, its employees or agents to immediately move or shift construction materials, concrete I and wooden planks that were left at the main entrance and the road in front of sub lot 2 and a part of the road beside sub lot 3, failing which the plaintiff is allowed to remove or shift the construction materials,

concrete and wooden planks wherein the costs to do the same would be borne by the first defendant; A

(e) a prohibitory injunction restraining the first defendant, its employees or agents from taking any action in any manner whatsoever to prevent the plaintiff from enjoying the peaceful use of the sub lots of which the plaintiff is the beneficial owner; B

(f) an order that the plaintiff be at liberty to claim from the first defendant any rental collected by or paid to the first defendant since 1983 by the tenants who are unknown to the plaintiff for sub lots 13 and 14; and

(g) interest at the rate of 8%pa on the rental that has not been paid since 1983 from the date of the writ until full and final settlement. C

Subsequent to the plaintiff's claim, the first defendant had, vide application in encl 54 dated 27 November 1996, applied to have the second defendant included as a defendant to this suit on the ground that the second defendant is a co-owner of 11/180 undivided share of the land. Enclosure 54 was allowed and Yap Fah was added as the second defendant herein. D

The hearing of this suit has now reached the stage at which the first defendant has called three witnesses with one more witness to go. The second defendant is a 70-year old individual who was laboring under a false assumption that she was merely a witness in this action. Therefore, she attended court at the request of her then solicitors Messrs Gunaretnam & Co, believing that her presence was required as a witness and this belief was compounded by the fact that each time she attended court, she was paid a sum of RM50 to RM100 by one Chen Yoke Kian. E

Documents were allegedly signed by the second defendant without the contents being explained to the second defendant by her then solicitors. In June 2001, the second defendant's daughter happened to have read one of the letters that were sent by the second defendant's then solicitors and the second defendant was told that the second defendant was actually a defendant to this suit. Upon making this discovery, the second defendant requested for a set of the pleadings from her then solicitors who forwarded the same to her. She then discovered that defence and counterclaim had been filed on her behalf. F G

Subsequently, the second defendant appointed the present solicitors. Upon the present solicitor's advice, she made an application to amend her defence and counterclaim to reflect the true and accurate position in this suit vide encl 110. H

At the hearing of the application to amend, I heard the oral testimonies of three witnesses viz the second defendant's then solicitor, Mr Manian Raju, the second defendant and one Indran V Kumaraguru. My finding is that to some extent, there seems to be some communication gap between the second defendant, and her then solicitor pertaining to the facts of the case which form the basis of the instructions to be included in the second defendant's pleadings. I allowed the application to amend her defence and to withdraw her counterclaim. I

A The background substantially above constitutes the grounds for the second defendant's application.

OBJECTION BY FIRST DEFENDANT

B Mr S Letchumanan, learned counsel for the first defendant, objected to the second defendant's application on the following grounds:

(1) the application is baseless, vague and an afterthought and has jeopardized the first defendant's defence to the plaintiff's claim;

(2) the plaintiff has closed its case at the trial of this suit and the second C defendant could commence a separate suit;

(3) the first defendant was not aware of the sale and purchase agreement nor the proposal to partition and subdivide the land;

(4) the second defendant can commence an action for any of the relief under the Kanun Aturcara Negara (sic);

D (5) both defendants are co-owners who had reached an understanding that no claim can be made against the first defendant;

(6) the second defendant, her agents or servants have used the land and so the first defendant is not responsible to account for rental; and

E (7) the second defendant should not meddle with this suit as it is almost at the end of the trial.

SUBMISSION FOR SECOND DEFENDANT

F The second defendant's learned counsel, Miss Liza Chan, in response submitted that the aforesaid objections are without merits as the court at this stage of the application is not concerned with the merits.

She said that the first defendant is entitled to plead to the second defendant's claim for relief. She added that there was no such thing as 'Kanun Aturcara Negara'.

G She stressed that the commencement of a separate proceeding would lead to additional costs and multiplicity of proceedings.

DECISION OF THE COURT

H *Misnomer*

The reliance by the first defendant's learned counsel on a non-existent 'Kanun Aturcara Negara' is more of a misnomer caused by a typographical slip than the ignorance of the first defendant's learned counsel. The learned counsel's own careful editing of his written submission would have avoided I the resultant embarrassment. Be that as it may, I am prepared to treat it as 'Kanun Tanah Negara' (ie the National Land Code) as being the relevant law governing the process of partitioning and subdivision.

No leave required under O 16 r 8(1)

Order 16 r 8(1) pursuant to which the application is made is reproduced as follows:

> (1) Where in any action a defendant who has entered an appearance —
>
> (a) claims against a person who is already a party to the action any contribution or indemnity; or
>
> (b) *claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff*, or
>
> (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and himself but also as between either or both of them and some other person who is already a party to the action;
>
> then, subject to paragraph (2), *the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim* or, as the case may be, of the question or issue required to be determined. (Emphasis added.)

Upon a proper perusal of the entire provisions of O 16 r 8(1), in particular para (b) above, there can be no doubt that the second defendant is at liberty to issue and serve on the first defendant the notice as specifically particularized above, without leave of the court because the first defendant is already a party to the suit herein.

Order 16 r 8(1), in particular para (b) above, contains a statutory expression of the rule which was stated by Pearson J in *Towse v Loveridge* [1883] 25 Ch D 76 to the effect that while leave of the court is required to issue such a notice to a person who is not already a party to the action, such a rule does not apply to a person who is already a party.

It is pertinent to observe that O 16 r 8(1) is made subject to O 16 r 8(2) which reads:

> Where a defendant makes such a claim as is mentioned in paragraph (1) and that claim could be made by him by counterclaim in the action, paragraph (1) shall not apply in relation to the claim.

Hence, it seems clear to me that O 16 r 8(1) would cease to apply where a defendant brings a counterclaim against a co-defendant (see *Tan See Yin Vincent v Noone & Co & Anor* [1995] 1 MLJ 705 (SC).

In the instant case, since the second defendant is not bringing a counterclaim against the first defendant, I hold that under O 16 r 8(1)(b), the second defendant is entitled to issue and serve the said notice, without leave, on the first defendant.

Similar relief

As both the learned counsel have proceeded to argue vigorously on the basis that leave is required, I shall consider their submissions on this premise.

A The aforesaid background to this application shows that the plaintiff and the second defendant are claiming a strikingly and substantially similar relief against the first defendant in relation to the land. That being the case, the issue by the second defendant of the said notice is eminently suitable as it would avoid multiplicity of proceedings (see *Re Burford, Burford v Clifford* [1932] 2 Ch D 122; which was applied in *Myers v N & J Sherick Ltd & Ors* B [1974] 1 All ER 81 and *Ewe Koek Neoh v Ooi Soon Tin & Ors* [1926] 2 MC 107.

The court must not allow multiplicity of proceedings and ought to settle the disputes between parties to an action so that the same or substantially the same question would not be tried twice with possibly different results: C per Pennycuick J in *Standard Securities Ltd v Hubbard & Anor* [1967] 2 All ER 622.

In my view, the manifest purpose of O 16 r 8(1) is to avoid multiplicity of proceedings as the second defendant's claim against the first defendant is for a relief or remedy relating to or connected with the original subject matter and that coincides with the plaintiff's claim for relief or remedy D against the second defendant and both these claims are substantially the same.

Co-proprietorship of land

E It seems to be undisputed that the plaintiff, first defendant and second defendant are allegedly co-proprietors of the land. The law on co-proprietorship of land has been clearly explained by Suffian J (later LP) in *GP De Silva & Ors v Chua Yam Thong* [1962] MLJ 236 at p 237G left as follows:

> F ... the co-proprietor are entitled to the land in undivided shares in the proportions specified on the register. As land includes 'things attached to the earth', section 2, this means that they are also entitled to the fruits of the houses built by the defendant, in undivided shares in the proportions specified in the register.

Although the learned judge was referring to the then s 44(1) of the Land G Code Cap 138, the same is true of the law as contained in ss 342 and 343 of the National Land Code, especially s 343(1)(b) which expressly provides that 'so long as their co-proprietorship continues, they shall be entitled to possession and enjoyment of the whole'.

CONCLUSION

H

On the foregoing grounds, I make an order in terms of this application.

FURTHER DIRECTIONS

Order 16 r 8(3) reads as follows:

I

> No appearance to such a notice shall be necessary if the person on whom it is served has entered an appearance in the action or is a plaintiff therein, and the same procedure shall be adopted for the determination between the defendant

by whom, and the person on whom, such a notice is served of the claim, question or issue stated in the notice as would be appropriate under this Order if the person served with the notice were a third party and (where he has entered an appearance in the action or is a plaintiff) had entered an appearance to the notice.

In line with O 16 r 8(3), I direct that after the service by the second defendant of the said notice on the first defendant, it shall not be necessary for the first defendant to file an appearance but the first defendant is at liberty to plead in direct response to the said notice, within 14 days from the date of such service.

I further order that the first defendant and all parties herein be entitled to call new witnesses or recall any of their witnesses as they may consider necessary and advisable.

Order accordingly.

Reported by Peter Ling